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IN THE SUPREME COURT OF THE UNITED STATES

October Term 1984

No. 84-1067

DISTRICT OF COLUMBIA,

Petitioner,

v.

KENNETH M. BROWN,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF IN OPPOSITION

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QUESTION PRESENTED

1. Whether the United States Court of Appeals for the District of Columbia Circuit (en banc) erred in holding that the District of Columbia's six-months notice provision does not apply to federal constitutional tort suits against the District because that statute is not a local statute of limitations or a related tolling or survival rule, but instead is a condition precedent on the accrual of rights of action for damages against the District.

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BRIEF IN OPPOSITION

REASONS FOR DENYING THE WRIT [1]

1. Introduction

There are no special and important reasons for this Court to review the court of appeals' en banc holding that the six-months notice-of-claims provision of D.C. Code § 12-309 (1981) does not apply to constitutional tort actions against the District of Columbia. That decision rested on two separate grounds: (1) as a matter of statutory construction, Congress did not intend for the notice provision to apply to federal causes of

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[1] In this pleading, citations to the court of appeals' decision, Brown v. United States, 742 F.2d 1498 (D.C. Cir. 1984) (en banc), will be to the opinion as reprinted in the Appendix to the District's Petition for Writ of Certiorari, and will be cited as "Pet. App." References to the District's Petition for a Writ of Certiorari will be cited as "Cert. Pet."

action, as opposed to damage suits arising under local law; and (2) treating the notice statute as a purely local law akin to state or municipal notice provisions, federal borrowing doctrine did not provide for its application to federal causes of action. See Brown v. United States, (D.C. Cir. 1984) (en banc), Pet. App. at 5a-6a.

The first, statutory-construction basis for the decision below clearly does not merit review by this Court. It presents a question of congressional intent affecting only the District, and has absolutely no national importance. Moreover, while the en banc majority is clearly correct in concluding that Congress intended Section 12-309 to apply only to ordinary tort actions arising under local law, see Pet. App. at 6a-9a, the court's determination was not constitutionally based, and in the event that Congress disagrees with the court of appeals, it can pass legislation expressly imposing a special notice limitation on the accrual of federal causes of action against the District, [2/] thereby reversing the decision below. Such action

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[2/] Indeed, the District of Columbia does not appear seriously to contend that the court of appeals' interpretation of legislative intent merits review by this Court. Its "question presented" is framed in terms of whether the court of appeals "erred in refusing to apply D.C. Code § 12-309 to constitutional tort actions, under established borrowing principles." Cert. Pet. at i (emphasis added). Nevertheless, the District goes into great detail about the legislative history and purported purpose of Section 12-309. See Cert. Pet. at 4-7, 10, 17-23. To the extent that this presentation represents a claim that the statutory-construction issue satisfies the discretionary standards for granting certiorari, it must be rejected for the reasons set forth above.

would also make the "borrowing" question irrelevant, so that on neither issued presented by the court of appeals' decision merits this Court's review.

Several additional factors also demonstrate that the borrowing-doctrine question does not justify the exercise of this Court's discretionary review.

First, no irreconcilable conflict in the lower federal courts or in the state courts requires this Court's resolution. There is no split in the federal courts on the issue whether local notice-of-claim provisions like D.C. Code § 12-309 should be borrowed for use in federal constitutional tort actions. The federal courts uniformly agree that such notice provisions do not apply to causes of action arising under federal law. See infra at 5-6 & n.3.

The issue is one that rarely arises in state court. While one, or at most, two state courts have applied notice provisions to constitutional damage actions, the weight of state judicial authority is in conformity with the decision below. See infra at 6 & n.4. And the state decisions that do apply notice provisions to federal causes of action are distinguishable and do not present a conflict on the facts of this case. See infra at 6-8.

Second, the fundamental principles governing the determination of whether local law should be borrowed for federal causes of action have been well established by this Court, and the court of appeals correctly followed these principles in

holding that the District's notice provision was not the sort of local law that applied to federal constitutional damages actions. See infra at 8-14.

Finally, no special considerations of public policy or practicality run counter to the court of appeals' decision. Although the District asserts that this case "is . . . important for what it portends for [the District and] other municipal governments" in terms of liability under 42 U.S.C. § 1983, Cert. Pet. at 14 (emphasis added), in fact, the decision below "portends" absolutely nothing of national significance. It has been clearly established for well over a decade that local notice-of-claims provisions do not apply to federal constitutional tort suits, see Donovan v. Reinbold, 433 F.2d 738, 742 (9th Cir. 1970), and municipalities have functioned successfully under this rule. See also infra at 5-6 & n.3, 15-19.

With respect to the District specifically, the District's claim that the court of appeals' holding "makes it impossible for [it] to establish any claims system that could reasonably meet its needs -- given the large volume [of] claims asserted against it and the amount of litigation to which it is a party," Cert. Pet. at 13, is unpersuasive. See infra at 15-19. And to the extent that the inapplicability of local notice provisions means that municipalities, including the District, cannot so easily evade liability for the constitutional injuries they inflict upon individuals, see Cert. Pet. at 13-14, that

result is fully consistent with the public policy goals embodied in federal constitutional law. See infra at 13-16 & n.9.

2. The Court Of Appeals' Decision Is Consistent With The Overwhelming Weight Of The Case Law

The question whether a local notice-of-claims provision should be borrowed for use in constitutional damage actions against governmental entities is not a novel one. To our knowledge, every federal court decision that has addressed the issue, other than the rulings overturned by the court of appeals' en banc decision in the instant case, has held that such notice provisions do not apply to constitutional tort suits. 3/ And

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3/ See, e.g., Cowdrey v. City of Eastborough, 730 F.2d 1376, 1380 (10th Cir. 1984); Rosa v. Cantrell, 705 F.2d 1208, 1221 (10th Cir. 1982), cert. denied, 104 U.S. 85 (1983); Childers v. Independent School District No. 1, 676 F.2d 1338, 1342-43 (10th Cir. 1982); Brandon v. Board of Education, 635 F.2d 971, 973 n.2 (2d Cir. 1980), cert. denied, 454 U.S. 1123 (1981); Ehlers v. City of Decatur, 614 F.2d 54, 56 (5th Cir. 1980); Shouse v. Pierce County, 559 F.2d 1142, 1146 (9th Cir. 1977) (per curiam); Sethy v. Alameda County Water District, 545 F.2d 1157, 1162 (9th Cir. 1976) (en banc) Donovan v. Reinbold, 433 F.2d 738, 741-42 (9th Cir. 1970); Willis v. Reddin, 418 F.2d 702, 704-05 (9th Cir. 1969); Waller v. Butkovich, 584 F. Supp. 909, 946 (M.D.N.C. 1984); Davis v. Krauss, 478 F. Supp. 823, 825 (E.D.N.Y. 1979); Williams v. Posey, 475 F. Supp. 133, 134-35 (M.D. Ga. 1979); Paschall v. Mayone, 454 F. Supp. 1289, 1298 (S.D.N.Y. 1978); Perrote v. Percy, 452 F. Supp. 604, 605 (E.D. Wis. 1978); Lively v. Cullinane, 451 F. Supp. 999, 1000 (D.D.C. 1976); Glover v. City of New York, 401 F. Supp. 632, 635 (E.D.N.Y. 1975); Carrasco v. Klein, 381 F. Supp. 782, 787 n.12 (E.D.N.Y. 1974); Mathias v. City of Milwaukee Department of City Development, 377 F. Supp. 497, 500 (E.D. Wis. 1974); Luker v. Nelson, 341 F. Supp. 111, 118 (N.D. Ill. 1972); Laverne v. Corning, 316 F. Supp. 629, 637 (S.D.N.Y. 1970); Skrapits v. Skala, 314 F. Supp. 510, 511 (N.D. Ill. 1970); Cox v. University of the District of Columbia, 24 Fair Empl. Prac. Cas. (BNA) 690, 693 (D.D.C. Dec. 3, 1980). Cf. Woods v. Homes & Structures of Pittsburgh, Kansas, Inc., 489 F. Supp. 1270, 1295 (1980) (notice-of-claim statute did not apply to (Cont'd)

while few state courts have confronted the borrowing question, the majority of those that have decided the matter have reached the same result as the decision below. 4/

The District asserts that review by this Court is appropriate because "[t]he decision below conflicts with decisions of the [state] courts of last resort in New York and Alabama." Cert. Pet. at 16. However, any conflict between the court of appeals' en banc decision and the cited cases, Stewart v. City of Northport, 425 So. 2d 1119 (Ala. 1983), and Mills v. County of Monroe, 59 N.Y.2d 307, 464 N.Y.S.2d 709, 451 N.E.2d 456 (1983), cert. denied, 104 S. Ct. 551 (1983), is more apparent than real.

In Stewart v. City of Northport, 425 So. 2d 1119 (Ala. 1983), the Alabama Supreme Court borrowed the state's six-month notice statute as the applicable statute of limitations in a Section 1983 action by landowners against a municipality for unfavorable zoning rulings concerning development of their property. The court looked to the notice statute only to furnish the time period for filing the federal cause of action in federal court. It declared: "The only requirement is that suit be filed within the six months allowed by the statute of limitations." 425 So. 2d at 1121. The court did not borrow the notice

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action against municipality brought under federal securities law).

4/ See, e.g., Williams v. Harvath, 16 Cal. 3d 834, 129 Cal. Rptr. 453, 548 P.2d 1125, 1128-30 (1982); Overman v. Klein, 103 Idaho 795, 654 P.2d 888, 892 (1982); Doe v. Ellis, 103 Wis. 2d 581, 309 N.W.2d 375, 377 (1981).

requirement as a separate, supplemental condition precedent on the accrual of the federal cause of action against the municipality.

In Mills v. County of Monroe, 59 N.Y.2d 307, 464 N.Y.S.2d 709, 451 N.E.2d 456, cert. denied, 104 S. Ct. 551 (1983), the New York Court of Appeals, while acknowledging that "the Federal District Courts in New York have not applied the State's notice of claim statutes in civil rights actions brought under section[s] 1981 . . . or 1983," 451 N.E.2d at 457, nevertheless applied a state notice-of-claim provision to a Section 1981 lawsuit that sought damages for alleged employment discrimination. Id. at 458-59.

However, as the en banc majority pointed out below, the Mills decision rests in significant part "on the unusual flexibility of the relevant New York provision." Pet. App. at 23a n.6. By its terms, the New York notice provision provided for late notice upon application to the court and a showing of good cause "so long as the [discretionary] extension does not exceed the time limit" set by the statute of limitations. 451 N.E.2d at 458. Also, the New York notice requirement was subject to "a judicially created exception" waiving notice for "actions brought 'to vindicate a public interest.'" Id.

In the instant case, the respondent was imprisoned during the entire notice period (and indeed, until after he filed suit). See infra at 17 n.10. Also, he initially brought this suit as a class action for injunctive and declaratory relief, as

well as damages, to redress the violation of the constitutional rights of all inmates detained in thet Adjustment Unit of Lorton Reformatory's Youth Center One. 5/ Under the New York notice provision, it would appear that both the statutory provision for good-cause extension of the notice period and the judicially created exception for suits brought to vindicate the public interest would have meant that failure to provide notice would not have barred this action. Thus, as the court of appeals' majority fully realized, "even Mills would not support the District's [claim]" that the notice requirement applied to the instant lawsuit, Pet. App. at 23a n.6, and "there is no actual conflict between the decision below and Mills which would support review by this Court.

3. The Court Of Appeals Correctly Followed Well-Established Principles Of Federal Borrowing Doctrine In Holding That Section 12-309 Does Not Apply To Constitutional Damage Actions Against The District Of Columbia

a. The Decision Below Was Supported By Established Principles of Borrowing Doctrine

The court of appeals' refusal to borrow the Section 12-309 notice requirement for use in federal constitutional tort

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5/ The class action was not certified before summary judgment was granted to the defendants. The District Court dismissed the respondent's claims for injunctive and declaratory relief on the ground that they had become moot when he was transferred from Youth Center One. Because another action, Clark v. District of Columbia (Civ. Action No. 81-2072), was seeking injunctive and declaratory relief for the same conditions of confinement, on appeal the respondent dropped his challenge to the mootness decision and contested only dismissal of his damage action.

suits is fully supported by well-settled principles of federal borrowing doctrine. Federal courts are authorized to borrow local law for constitutional torts only (1) "where federal law is unsuited or insufficient 'to furnish suitable remedies,'" Moor v. County of Alameda, 411 U.S. 693, 703 (1973) (emphasis added) (quoting 42 U.S.C. § 1988), and (2) where the local law is "not inconsistent with the Constitution and laws of the United States." Id. Accord, Robertson v. Wegmann, 436 U.S. 584, 588 (1978). See Burnett v. Grattan, 104 S. Ct. 2924, 2928 (1984) (borrowing of state law for federal civil rights action authorized to supply "rule of decision required to adjudicate claims asserted under them") (emphasis added); Board of Regents v. Tomanio, 446 U.S. 478, 483-84 (1980) (state statute of limitations is borrowed for § 1983 actions because absence of such statute in federal law represents "a void"); Jaworski v. Schmidt, 684 F.2d 498, 500 (7th Cir. 1982) ("[s]tate law is to be resorted to in resolving an issue [in a Section 1983] action if, and only if, federal law is deficient, and if, and only if, state law 'is not inconsistent with the constitution and the laws of the United States'") (emphasis added), cert. denied, 460 U.S. 1015 (1983).

b. The Absence Of A Notice Provision Does Not Make The Law Governing Constitutional Tort Suits Deficient

The court of appeals correctly held that "the federal scheme for adjudicating constitutional torts" was not "deficient

for lack of a notice of claims provision." Pet. App. at 12a. The mere fact that state law addresses a matter not expressly provided for by Congress does not mean that federal law is "deficient." See Furtado v. Bishop, 604 F.2d 80, 97 (1st Cir. 1979) (even though issue not addressed by Section 1983, state law with respect to prejudgment interest does not govern federal constitutional damages actions), cert. denied, 444 U.S. 1035 (1980); McClure v. Borne Chemical Co., 292 F.2d 824, 830 (3d Cir.) (congressional silence with respect to security-for-costs provision not regarded as deficiency in federal law), cert. denied, 368 U.S. 939 (1961); Hill, "State Procedural Law in Federal Nondiversity Litigation," 69 Harv. L. Rev. 66, 92 (1955) (federal borrowing of local procedural rules should be limited because "[i]n most . . . instances [other than statutes of limitations], the application of local procedural rules of an outcome-determinative character in the enforcement of federally-created rights seems neither reasonable nor necessary") (emphasis added).

Thus, federal law is considered "deficient" when it does not provide statutes of limitations and coordinate tolling rules, or survivorship rules, not simply because Congress has not addressed the issue, but because rules of this sort "have long been respected as fundamental to a well-ordered judicial system," Board of Regents v. Tomanio, 466 U.S. at 487, and are "universally accepted" as familiar procedural aspects of

litigation. McClure v. Borne Chemical Co., 292 F.2d 824, 830 (3d Cir.), cert. denied, 368 U.S. 939 (1961). This justifies an inference that Congress intended courts to borrow such rules when not expressly provided. Id.

In contrast, as the court of appeals recognized, notice-of-claim provisions have not been considered "indispensabl[e] . . . to our ideals of justice. . . . from the beginnings of our federal system." Pet. App. at 13a. See McClure v. Borne Chemical Co., 292 F.2d 824, 830 (3d Cir.), cert. denied, 368 U.S. 939 (1961). Cf. Board of Regents v. Tomanio, 446 U.S. at 487; Campbell v. City of Haverhill, 155 U.S. at 610, 616-17 (1895).

Indeed, "[t]he necessity for . . . notice . . . is frequently a subject of judicial controversy," 18 McQuillin, The Law of Municipal Corporations, Notice § 53.151, at 728 (3d ed. 1984), and "a number of courts . . . [have even held] that such laws are unconstitutional." Id. § 53.152, at 729. 6/ This absence of traditional agreement that notice provisions are essential to a fair scheme of litigation means that there is no basis for concluding that Congress must have intended to limit federal causes of action by notice requirements, and to have the

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6/ See, e.g., Reich v. State Highway Department, 386 Mich. 617, 623-24, 194 N.W.2d 700, 702 (1972) (denial of equal protection); Turner v. Staggs, 89 Nev. 230, 235, 510 P.2d 879, 883, cert. denied, 414 U.S. 1079 (1973) (same); O'Neil v. City of Parkersburg, 160 W. Va. 694, 237 S.E.2d 504, 509 (W. Va. 1977) (denial of equal protection and due process).

lack of a federal notice provision rectified by recourse to state law.

Moreover, differences between the operation of Section 12-309 and a genuine statute of limitations also demonstrate that the absence of a notice provision is not a deficiency for borrowing purposes. Whereas "statutes of limitations affect the remedy only, and do not impair the right," Campbell v. City of Haverhill, 155 U.S. 610, 618 (1895); see Bomar v. Keyes, 162 F.2d 136, 140-41 (2d Cir.) (Hand, J.), cert. denied, 332 U.S. 825 (1947); Pet. App. at 20a-21a, Section 12-309 establishes a "'condition precedent'" to the very existence of any right of action for tort damages against the District. Gwinn v. District of Columbia, 434 A.2d at 1378 (citation omitted). Compliance with the notice provision thus constitutes an actual element of a damage action against the District. See id.; Pet. App. at 20a. It "impair[s] the right," not the remedy, and accordingly is not the type of local procedural rule that is traditionally borrowed for federal causes of action. See Campbell v. Haverhill, 155 U.S. at 618; Pet. App. at 20a. 7/

7/ The District characterizes Gwinn's understanding of the notice provision as "dicta." Cert. Pet. at 10 n.9. This is plainly wrong. A reading of the opinion demonstrates that the court held that Section 12-309 was not subject to the District's tolling provisions because it was a "'condition precedent'" to the "accru[al]" of a "'right of action' or 'entitlement to maintain an action'" for damages against the District, and not a statute of limitations. Gwinn v. District of Columbia, 434 A.2d at 1378 (citation omitted). Since noncompliance with the notice provision meant that no cause of action had accrued, the tolling provisions, which "presuppose[d] that a 'right of action' exists," id., were inapplicable.
(Cont'd)

c. Borrowing The District's Notice Provision Would Be Inconsistent With Policies Underlying Constitutional Tort Suits

The court of appeals also correctly concluded that Section 12-309 was actually inconsistent with the policies underlying the federal cause of action. See Pet. App. at 21a-22a. Unlike statutes of limitations, the District's notice provision represents a conditional waiver of the District's sovereign immunity. See Gwinn v. District of Columbia, 434 A.2d at 1378 & n.3; Kelton v. District of Columbia, 413 A.2d 919, 920 & n.2 (D.C. 1980); Wilson v. District of Columbia, 338 A.2d 437, 438 n.2 (D.C. 1975). It "places the District at a litigative advantage," Pinkney v. District of Columbia, 439 F. Supp. 519, 524 (D.D.C. 1977), in order "to protect the revenues of the District of Columbia from unreasonable suits." H.R. Rep. No. 2010 at 2. See Pinkney v. District of Columbia, 439 F. Supp. at 524-25 (special notice given District "for reasons of economy," in order to "conserv[e] taxpayer resources").

F.W. Woolworth Co. v. Stoddard, 156 A.2d 229, 231 (D.C. 1959), and Dellums v. Powell, 566 F.2d 216, 229 (D.C. 1977), cert. denied, 438 U.S. 916 (1978), which relied upon Stoddard, are not to the contrary. These cases were primarily concerned with the point that noncompliance with Section 12-309 is not "a jurisdictional bar to suit" and is therefore subject to waiver if not asserted by the District. Dellums v. Powell, 566 F.2d at 229 (emphasis added). Accord, F.W. Woolworth Co. v. Stoddard, 156 A.2d at 251.

Sovereign immunity for municipal governments, including the District of Columbia, [8] is fundamentally inconsistent with the purpose of federal constitutional damage actions, which is "to provide protection to those persons wronged by the 'misuse of power, possessed by virtue of state [or District of Columbia] law and made possible only because the wrongdoer is clothed with the authority of state [or District] law.'" Owen v. City of Independence, 445 U.S. 622, 650 (1980) (quoting Monroe v. Pape, 365 U.S. 167, 184 (Harlan, J., concurring)).

In Owen v. City of Independence, 445 U.S. at 657, this Court held that "municipalities have no immunity from damages liability flowing from their constitutional violations." Accordingly, "[t]o import notions of municipal immunity" embodied in the District's notice of claims provision "into federal civil rights law would be to undermine a federal policy rather than fill a deficiency in the federal scheme." Pet. App. at 22a. See Hampton v. City of Chicago, 484 F.2d 602, 607 (7th Cir. 1973) (Stevens, J.), cert. denied, 415 U.S. 917 (1974), cited with approval in Owen v. City of Independence, 445 U.S. at 647 n.30; Donovan v. Reinbold, 433 F.2d 738, 742 (9th Cir. 1970); Cox v. University of the District of Columbia, 24 Fair Empl. Prac. Cas. (BNA) 690, 693 (D.D.C. Dec. 3, 1980).

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[8] By its 1979 amendment to 42 U.S.C. § 1983, Congress expressly eliminated the District's governmental immunity by subjecting to statutory suit for its constitutional torts. See Act of December 29, 1979, Pub. L. No. 96-170, 93 Stat. 1284l.

4. Refusal To Borrow A Local Notice-Of-Claims Provision For Use In Federal Constitutional Tort Suits Does Not Seriously Hinder A Municipality's Ability To Defend Itself Against Unreasonable Litigation

Finally, the District urges this Court to review the decision below because it claims that the inapplicability of local notice provisions will seriously burden it and other municipalities in defending constitutional damage actions. See Cert. Pet. at 12-16. It asserts that "[t]he decision . . . makes it possible for litigants to assert claims against the District where it is highly doubtful that the District can collect evidence to defend those legal actions." Id. at 12. It also complains about "the record-keeping burden that the decision . . . has placed on the District . . . in prisoner cases alone," id. at 13, declaring that "[t]he District will have to keep detailed records concerning its individual prisoners and the operation of its prisons, possibly for decades, because it has no way of knowing whether any of its long term prisoners will file suit upon their release." Id. at 13-14.

The District greatly exaggerates the practical implications of the ruling below, partly because it ignores the general desire of persons who believe that they have suffered a constitutional injury to obtain prompt redress, partly because it fails to address the limited nature of its own notice provision even when it is applicable, and partly because it completely fails to consider the elements of a constitutional damage action

which must be satisfied by any plaintiff bringing such a suit. 9/

The District, contending that "[t]he facts of this case . . . are especially useful in illustrating the difficulties [it] . . . will face" under the decision below, Cert. Pet. at 13, paints a picture of a prisoner's remaining silent about violations of his constitutional rights throughout the duration of his incarceration and bringing suit only after his release begins the running of the relevant statute of limitations, long after the relevant incidents occurred. See id.

The "facts of this case," however, "illustrate" how unrealistic the District's concern about the absence of notice really is. The respondent, while still incarcerated at Lorton Reformatory, filed the instant suit seeking redress for the conditions in the Adjustment Unit only a little more than six

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9/ The decision below leaves Section 12-309 fully applicable to tort suits arising under local law. While the District contends that "the importance" of Section 12-309 "is manifest in light of the thousands of claims (many of which are constitutionally based) that are filed against the District each year," Cert. Pet. at 19, see id. at 13, it nowhere specifies the volume of constitutional damage actions to which it is subject. Assuming arguendo that the decision below does impose the "burdens" asserted by the District, they may well be insignificant if there are relatively few constitutional tort suits to which the court of appeals' ruling applies. On the other hand, if the District is faced with a large number of constitutional damage actions, that fact would seem to indicate that the public policy underlying constitutional tort suits would be furthered by making the District liable for its violations of constitutional rights without regard to the special protections of the notice provision.

months after his last confinement there. 10/ The spectre of stale claims, brought years, "possibly . . . decades," after the alleged constitutional violation certainly is not "illustrated by the facts of this case." Cert. Pet. at 13, 14.

The relative unimportance of the decision below is further accentuated by consideration of the limited protection that Section 12-309 affords the District even when it does apply. The notice provision covers only damage actions, not actions against the District for declaratory or injunctive relief. See Lively v. Cullinane, 451 F. Supp. 999, 1000 (D.D.C. 1976); Pinkney v. District of Columbia, 439 F. Supp. 519, 524 n.5 (D.D.C. 1977). Also, it applies only to damage actions against the District, not to damage suits against the District's officers or employees for torts committed within the scope of their duties, even though, as in this case, the District actually defends the suit and, under its indemnification rules, may be financially responsible for any resulting monetary awards. See Monell v. Department of Social Services, 436 U.S. 658, 690 n.55

10/ Apparently, the respondent was confined in the Adjustment Unit of Youth Center One, whose conditions allegedly violated his constitutional rights, from Oct. 2, 1978, until Jan. 8, 1979, and again from Jan. 27, 1979, until April 3, 1979. See Complaint at 2, Brown v. United States, Civ. Action No. 79-2809 (D.D.C. Sept. 3, 1981), rev'd and remanded, Brown v. United States, 742 F.2d 1498 (D.C. Cir. 1984) (en banc). He was an inmate of Youth Center One from June 8, 1978, until August 21, 1978, at which time he was transferred to a federal correctional institution, where he remained at least as late as January, 1981. See Defendant's Statement of Material Facts ¶1, Brown v. United States, supra; Plaintiff's Motion for Court Documents, Brown v. United States, supra. The suit was filed on October 19, 1979.

(1978) ("official-capacity suits generally represent only another way of pleading an action against an entity of which an officer is an agent").

Thus, even if Section 12-309 were borrowed for federal constitutional tort suits, by its terms it would make no difference to the District with respect to the need to develop evidence in injunctive and declaratory relief suits against the District or in damage actions against District officers and employees defended by the District. Nor would it eliminate uncertainty as to the District's potential financial obligations in damage actions against officers or employees. The claim that the decision below "has drastically altered" (Cert. Pet. at 12) the protections available to the District with respect to federal constitutional torts therefore greatly overstates the practical impact of the court of appeals' holding.

Similarly, the District's claim that notice is essential to a municipality's ability to defend constitutional tort suits ignores the elements that distinguish the federal cause of action from an ordinary, local-law tort suit. In constitutional tort suits, where the doctrine of respondeat superior does not apply, the District cannot be held liable for isolated instances of misconduct by its officials or employees. See Monell v. Department of Social Services, 436 U.S. 658, 694 (1978); Owen v. City of Independence, 445 U.S. at 633. Rather, there must be proof "that official policy [or custom] is responsible for a deprivation of [constitutional] rights."

Monell v. Department of Social Services, 436 U.S. at 690; id. at 694. See Owen v. City of Independence, 445 U.S. 622, 633, 657 (1980); Rizzo v. Goode, 423 U.S. 362, 371-77 (1976).

Challenges to action taken pursuant to official policy embodied in a "policy statement, ordinance, regulation or decision officially adopted and promulgated," Monell v. Department of Social Services, 436 U.S. at 690, by a governmental body obviously will not involve the same sort of problems of ephemeral proof which occur in ordinary tort suits when the issue is, e.g., whether a manhole cover was improperly placed or a District vehicle was recklessly operated. Similarly, in order to constitute "custom or usage" for purposes of constitutional tort liability, the challenged action must be "'persistent and widespread . . . permanent and well settled . . . .'" Id. at 691 (citation omitted). Logically, prompt notice and investigation are not essential for obtaining proof regarding "well settled" and "widespread" practices, and the refusal to borrow Section 12-309 should not unduly burden the defense of constitutional tort actions.

CONCLUSION

For the reasons set forth above, the District's Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 22nd day of March, 1985, I have caused one (1) copy of the foregoing Motion to Proceed In Forma Pauperis and three (3) copies of the Brief in Opposition to be served by first-class mail, postage prepaid, upon:

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